No. 94-286 (9)

Supreme Court, U.S.
FILED
NOV 16 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
Petitioner,

v.

BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,

v.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AND NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE SUPPORTING PETITIONERS

DANIEL R. BARNEY
LYNDA S. MOUNTS
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314
(703) 838-1865

JAN S. AMUNDSON
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 637-3055

KENNETH S. GELLER*
ERIKA Z. JONES
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 463-2000

* *Counsel of Record for the Amici Curiae*

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Cipollone v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) . . . . . *passim*
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Covey v. *Surgidev Corp.*, 815 F. Supp. 1089 (N.D. Ohio 1993) 11
CSX Transp., Inc. v. *Easterwood*, 113 S. Ct. 1732 (1993) . . . . . *passim*
Dawson v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981) 25
DeHaan v. *Whink Prods. Co.*, No. 91 C 0014, 1994 WL 24322 (N.D. Ill. Jan. 26, 1994) 10
DerGazarian v. *Dow Chem. Co.*, 836 F. Supp. 1429 (W.D. Ark. 1993) 10
Dorsey v. *Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981) cert. denied, 459 U.S. 880 (1982) 25
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Felder v. *Casey*, 487 U.S. 131 (1988) 19
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Gibson v. *Dow Chem. Co.*, No. Civ. A. 92-30, 1992 WL 404681 (E.D. Ky. Oct. 19, 1992) 10

TABLE OF AUTHORITIES—Continued

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Gile v. *Optical Radiation Corp.*, 22 F.3d 540 (3d Cir.), cert. denied, 63 U.S.L.W. 3343 (U.S. Oct. 31, 1994) 9
Gills v. *Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993) 22
Greenwood Trust Co. v. *Commonwealth of Massachusetts*, 971 F.2d 818 (1st Cir. 1992), cert. denied, 113 S. Ct. 974 (1993) 18
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Kinley Corp. v. *Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993) 18

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Kitts v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990) 16
Knippen v. *Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976) 25
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TABLE OF AUTHORITIES—Continued

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National Bank of Commerce of El Dorado v. *Kimberly-Clark Corp.*, No. 93-3012, 1994 U.S. App. LEXIS 24,616 (8th Cir. Oct. 25, 1994) 9
Nissan Motor Corp. v. *Superior Court*, 261 Cal. Rptr. 80 (Cal. Ct. App. 1989), cert. denied, 494 U.S. 1066 (1990) 16
Northwest Cent. Pipeline Corp. v. *Kansas Corp. Comm'n*, 489 U.S. 493 (1989) 19
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Papas v. *Upjohn Co.*, 985 F.2d 516 (11th Cir.), cert. denied, 114 S. Ct. 300 (1993) 9
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Schwartz v. *American Honda Motor Co.*, 710 F.2d 378 (7th Cir. 1983) 25
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Shenker v. *Baltimore & Ohio R.R.*, 374 U.S. 1 (1963) 9
Sheridan v. *United States*, 487 U.S. 392 (1988) 28
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Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 13, 24
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Trinity Mountain Seed Co. v. *MSD Agvet, Div. of Merck & Co.*, 844 F. Supp. 597 (D. Idaho 1994) 10

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Tucker v. *Collagen Corp.*, No. 93 C 2375, 1994 WL 87367 (N.D. Ill. Mar. 16, 1994) 11
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Wickstrom v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), cert. denied, 487 U.S. 1236 (1988) 16
Wisconsin Pub. Intervenor v. *Mortier*, 501 U.S. 597 (1991) 28
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Constitutional provision:

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Statutes and regulations:

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§ 1392(d) . . . . . *passim*
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S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709 6
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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AND NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

American Trucking Associations, Inc. (ATA) is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect

the interests of the trucking industry. That industry consists of every type of motor carrier operation throughout the United States and includes tens of thousands of for-hire carriers, private carriers, leasing companies, and trucking suppliers. ATA regularly advocates the trucking industry's interests before this Court and other courts. This Court previously granted ATA's motion for leave to file a brief as *amicus curiae* in support of the petition for a writ of certiorari in this case.

National Association of Manufacturers (NAM), a nonprofit trade association, is the largest national trade association for the country's manufacturing sector. Its members, approximately 12,800 companies and subsidiaries, cover the full spectrum of manufacturing industries and range in size from large companies to numerous small businesses. NAM's members employ approximately 85% of all manufacturing workers and produce over 80% of the manufactured goods in the United States. NAM members operate in every state of the country and are vitally interested in protecting the free flow of commerce unburdened by improper state legal impediments.

Members of ATA and NAM have a strong interest in motor vehicle safety. The Federal Motor Vehicle Safety Standard at issue in this case, 49 C.F.R. § 571.121 (FMVSS 121), grants an option to motor vehicle manufacturers whether to install antilock braking devices on trucks and trailers. The court of appeals nevertheless held that FMVSS 121 does not preempt inconsistent state common law standards that *require* antilock brakes for trucks and that lay juries are at liberty to second-guess the policy judgment of an expert federal agency on the complex issue whether a particular motor vehicle must have antilock brakes. In so ruling, the court adopted an unprecedented and plainly erroneous interpretation of this Court's holding on federal preemption in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

If this rationale stands, it will have a profound and deleterious effect not only on Federal Motor Vehicle Safety Standards but in all cases in which a federal preemption defense is properly advanced by those (such as the members of ATA and NAM) who must comply with uniform federal health or safety standards. ATA and NAM accordingly have a vital interest in the issues presented in this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents' tort actions under Georgia law seek damages from petitioners based solely on the fact that trucks manufactured by petitioners, which were involved in accidents affecting respondents, did not have antilock brakes. Petitioners have raised a federal law preemption defense, citing their compliance with the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169) (Safety Act),[2] and FMVSS 121, 49 C.F.R. § 571.121, promulgated by the National Highway Traffic Safety Administration (NHTSA) under the Safety Act.

FMVSS 121, when originally promulgated in the early 1970s, required antilock brakes on all trucks and trailers. See *Paccar, Inc.* v. *National Highway Traffic Safety Admin.*, 573 F.2d 632, 639 n.26 (9th Cir.), cert. denied, 439 U.S. 862 (1978). The Ninth Circuit in *Paccar* invalidated this requirement, focusing on the "massive evidence presented to NHTSA that many vehicles equipped with antilock[] [brakes] were potentially more dangerous in performance than pre-Standard [121] vehicles" and finding that "the agency's failure to conduct more intensive testing of trucks and tractor-trailers certified under the Standard" was an "abuse of its

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.

[2] For ease of reference, we cite to the prior codification, which was cited by the courts below.

discretion." *Id.* at 643. The court concluded that, in these circumstances, a standard mandating antilock brakes "created a potentially * * * hazardous highway situation." *Ibid.*

The Ninth Circuit remanded the case to NHTSA and invited the agency to "propose new standards" supported by "more pro[b]ative and convincing data evidencing the reliability and safety of vehicles that are equipped with antilock" brakes. *Ibid.* Unable to do so at that time, NHTSA instead amended FMVSS 121 to make antilock brakes optional on trucks and trailers. See 44 Fed. Reg. 46,849 (1979). FMVSS 121, which has not since been amended by NHTSA to remove this option, now provides "standards for minimum acceptable performance" of optionally installed antilock brakes, *ibid.*, and states explicitly that any regulations that would appear to require the installation of antilock brakes "are not applicable to trucks and trailers." FMVSS 121 § S3.

In their defense, petitioners in this case invoked the express option granted under FMVSS 121 not to install antilock brakes on their trucks and the preemption provision of the Safety Act, which proscribes any state safety standard that is inconsistent with an FMVSS. 15 U.S.C. § 1392(d). Although the Eleventh Circuit acknowledged that FMVSS 121 "gave manufacturers the choice of whether to install anti-lock brakes" (Pet. App. 6a), the court nevertheless rejected petitioners' preemption defense.

The court of appeals erroneously held that the Safety Act does not expressly preempt respondents' tort claims because the Act's preemption provision does not refer to state common law and the Act's general savings clause bars preemption of common law liability. This Court has previously rejected both of these rationales. In *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2619-2621 (1992), the Court held that a preemption clause referring only to state law "'requirement[s] or prohibition[s]'" encompassed common

law liability. And the Court has long held that a general savings clause is properly read only as indicating Congress' intent to preclude field preemption and should not otherwise be construed to undermine a carefully drawn federal regulatory regime.

The Eleventh Circuit also rejected petitioners' implied preemption argument. Without a hint of the drastic consequences, the court of appeals revolutionized federal preemption law by interpreting this Court's decision in *Cipollone* to mandate "that when there is an express pre-emption provision" in a federal statute a court "should not consider implied pre-emption" at all. Pet. App. 11a. Under this expansive reading of *Cipollone*, conduct that is *required* by federal law may be *prohibited* by state law. No decision of this Court has ever adopted or even remotely suggested this astounding result in the face of the Supremacy Clause of the Constitution. U.S. Const. art. VI.

These holdings on express and implied preemption, if affirmed by this Court, would dramatically undercut the efficacy of a variety of federal programs requiring nationally uniform standards and would have a severe adverse effect on interstate commerce. State tort law should not be allowed to frustrate the purposes of a federal scheme of health or safety regulation.

ARGUMENT

I. THE SAFETY ACT EXPRESSLY PREEMPTS COMMON LAW TORT CLAIMS THAT ARE INCONSISTENT WITH FEDERAL MOTOR VEHICLE SAFETY STANDARDS

Respondents' tort claims under Georgia law are expressly preempted by the Safety Act, which mandates national uniformity in Federal Motor Vehicle Safety Standards (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

In explaining the need to preempt state law, the Senate Report on the Safety Act emphasized that "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2714. Thus, "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." *Id.* at 4, 12, 1966 U.S.C.C.A.N. at 2712, 2720. As President Johnson remarked, the "alternative is unthinkable — 50 standards for 50 different states. I believe that this would be chaotic." 112 Cong. Rec. 14,253 (1966).

Respondents' tort claims are expressly preempted by the Act's prohibition on any state "safety standard applicable to the same aspect of [vehicle or equipment] performance" as an FMVSS that is not identical to that Standard. 15 U.S.C. § 1392(d). Here, respondents advocate a state common law standard that would *require* manufacturers to install antilock brakes on trucks by imposing potentially massive liability on any manufacturer that failed to do so. This common law rule unquestionably addresses an "aspect of [vehicle or equipment] performance."

FMVSS 121, however, governs "the same aspect of performance" as the common law rule urged by respondents. The Standard, as originally promulgated by NHTSA, mandated antilock brakes by requiring trucks to stop within certain distances without lockup of any wheel. *Paccar*, 573 F.2d at 639 n.26. In response to the Ninth Circuit's invalidation of this mandate on safety grounds in *Paccar*, NHTSA amended the Standard for the express purpose of removing the antilock brake requirement. See FMVSS 121 § S3, 49 C.F.R. § 571.121 S3 (regulations requiring antilock brakes "are not applicable to trucks and trailers"); 44 Fed. Reg. 46,849 (1979). NHTSA could simply have repealed (or suspended) the mandate. Instead, the agency chose to retain the performance requirements for antilock brakes in the event a manufacturer decided to install them, see *ibid.* (FMVSS 121 provides the "standards for minimum acceptable performance" of antilock braking systems), but made their installation optional. Thus, as the Eleventh Circuit acknowledged in this case, FMVSS 121 — by positive enactment of NHTSA and for purposes of highway safety — gives truck "manufacturers the choice of whether to install anti-lock brakes." Pet. App. 6a.[3]

The predicate for express preemption under Section 1392(d) of the Safety Act is therefore established. FMVSS 121 explicitly addresses the same "aspect of [vehicle or equipment] performance" — whether trucks must have antilock brakes — as the state law standard advocated by respondents. And the federal and state standards are not identical: the federal standard makes antilock brakes

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[3] The Eleventh Circuit recognized that respondents' tort claims are "addressed by a [federal] safety standard established under the Safety Act." Pet. App. 10a. Accordingly, this is not a case in which a Federal Motor Vehicle Safety Standard may be broadly construed to grant an "option" merely by failing to address an aspect of motor vehicle performance.

optional, whereas the state standard makes them *mandatory*. The court of appeals did not dispute that if the State of Georgia attempted to adopt this requirement (and thereby remove the federal safety option) by statute or regulation, then the state law would be expressly preempted. The only issue is whether the result should be different in this case because the State seeks to impose the same requirement through its common law. Respondents maintain, and the Eleventh Circuit held, that common law rules are not state "safety standards" and are not preempted by Section 1392(d).

A. The Safety Act's Preemption Clause Bars Inconsistent Common Law Duties.

In rejecting express preemption (Pet. App. 7a-11a), the Eleventh Circuit held that common law claims do not fall within the express preemption provision of the Safety Act because Congress failed to "'make explicit reference to state common law in the Act's pre-emption clause.'" Pet. App. 8a (quoting *Taylor* v. *General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990)).

That rationale, however, was clearly repudiated by *Cipollone*, which held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] . . . imposed under State law.'" See 112 S. Ct. at 2619-2621 (plurality) (citation omitted); *id.* at 2634 (Scalia, J., concurring in part and dissenting in part). The *Cipollone* Court held that it made no difference that the preemption provision failed to "make explicit reference" to common law claims. This holding was premised on the Court's long-held view that "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" *Id.* at 2620 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)).

Numerous decisions by this Court have emphasized that the Supremacy Clause does not recognize a distinction

between state regulation in the form of statutes and rules on the one hand, and common law duties enforced by judges and juries on the other. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (a "system under which each State could, through its courts, impose * * * its own * * * requirements could hardly be more at odds with the uniformity contemplated by Congress"); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982); see also *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-115 (1987) (referring to state common law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

Since the decision in *Cipollone*, the widely accepted understanding among the courts of appeals is that statutory language preempting state law "requirements" or "standards" necessarily means that Congress intended expressly to preempt common law claims.[4] Indeed, the overwhelming majority of courts across the country have followed *Cipollone* and reached the same conclusion in interpreting the scope of preemption clauses in numerous federal health and safety statutes, including the Federal Insecticide, Fungicide and

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[4] See *National Bank of Commerce of El Dorado* v. *Kimberly-Clark Corp.*, No. 93-3012, 1994 U.S. App. LEXIS 24,616 (8th Cir. Oct. 25, 1994); *Gile* v. *Optical Radiation Corp.*, 22 F.3d 540, 542 (3d Cir.), cert. denied, 63 U.S.L.W. 3343 (U.S. Oct. 31, 1994); *Worm* v. *American Cyanamid Co.*, 5 F.3d 744, 748-749 (4th Cir. 1993); *King* v. *E.I. Du Pont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir.), cert. dismissed, 114 S. Ct. 490 (1993); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), cert. denied, 114 S. Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), cert. denied, 114 S. Ct. 60 (1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993).

Rodenticide Act, 7 U.S.C. §§ 136, *et seq.*,[5] the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261, *et seq.*,[6] the Medical Device Amendments of 1976 to the Federal Food,

[5] See, *e.g.*, *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994); *Bingham* v. *Terminix Int'l Co.*, 850 F. Supp. 516, 520 (S.D. Miss. 1994); *Allen* v. *Pennco Engineering Co.*, 847 F. Supp. 1315, 1319 (M.D. La. 1994); *Trinity Mountain Seed Co.* v. *MSD Agvet, Div. of Merck & Co.*, 844 F. Supp. 597, 601 (D. Idaho 1994); *Quad R Farms* v. *American Cyanamid Co.*, 840 F. Supp. 694 (D. Minn. 1993); *DerGazarian* v. *Dow Chem. Co.*, 836 F. Supp. 1429, 1447 (W.D. Ark. 1993); *Kolich* v. *Sysco Corp.*, 825 F. Supp. 959, 961 (D. Kan. 1993); *Levesque* v. *Miles Inc.*, 816 F. Supp. 61, 69 (D.N.H. 1993); *Casper* v. *E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 (E.D. Wash. 1992); *Burke* v. *Dow Chem. Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *Gibson* v. *Dow Chem. Co.*, No. Civ. A. 92-30, 1992 WL 404681, *2 (E.D. Ky. Oct. 19, 1992); *Brennan* v. *Dow Chem. Co.*, 613 So. 2d 131, 132 (Fla. Dist. Ct. App. 1993); *Yowell* v. *Chevron Chem. Co.*, 836 S.W.2d 62, 66 (Mo. Ct. App. 1992); *June* v. *Laris*, 602 N.Y.S.2d 778, 784 (N.Y. Sup. Ct. 1993), aff'd, No. 70011, 1994 WL 601588 (N.Y. App. Div. Nov. 3, 1994); *Hopkins* v. *Ciba-Geigy Corp.*, 432 S.E.2d 142, 145-146 (N.C. Ct. App. 1993).

[6] See, *e.g.*, *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), cert. denied, 113 S. Ct. 2999 (1993); *DeHaan* v. *Whink Prods. Co.*, No. 91 C 0014, 1994 WL 24322, *6 (N.D. Ill. Jan. 26, 1994); *Salazar* v. *Whink Prods. Co.*, No. 93CA0055, 1994 WL 115876, *2 (Colo. Ct. App. Apr. 7, 1994), cert. denied (Oct. 17, 1994); *State ex rel. Jones Chems., Inc.* v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994).

Drug and Cosmetic Act, 21 U.S.C. §§ 360c, *et seq.*,[7] and the Federal Boat Safety Act, 46 U.S.C. §§ 4301, *et seq.*[8]

The Eleventh Circuit's contrary holding in this case — that the reference in the Safety Act's preemption clause to any inconsistent state "safety standard" does *not* encompass common law standards — cannot stand in light of this Court's decision in *Cipollone*, which has been followed by scores of federal and state court decisions finding express preemption in similar contexts.

[7] See, *e.g.*, *Mendes* v. *Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994); *King v. Collagen Corp.*, 983 F.2d 1130, 1135 (1st Cir.), cert. denied, 114 S. Ct. 84 (1993); *Slater* v. *Optical Radiation Corp.*, 961 F.2d 1330, 1333 (7th Cir.), cert. denied, 113 S. Ct. 327 (1992); *Bravman* v. *Baxter Healthcare Corp.*, 842 F. Supp. 747, 755 (S.D.N.Y. 1994); *Griffin* v. *Medtronic, Inc.*, 840 F. Supp. 396, 397 (D. Md. 1994); *Tucker* v. *Collagen Corp.*, No. 93 C 2375, 1994 WL 87367, *3 (N.D. Ill. Mar. 16, 1994); *Michael* v. *Shiley, Inc.*, No. Civ. A. 93-1729, 1994 WL 59349, *6 (E.D. Pa. Feb. 25, 1994); *Kemp* v. *Pfizer, Inc.*, 835 F. Supp. 1015, 1020 n.4 (E.D. Mich. 1993); *Reiter* v. *Zimmer, Inc.*, 830 F. Supp. 199, 203 (S.D.N.Y. 1993); *Cameron* v. *Howmedica, Div. of Pfizer Hosp. Prods. Group, Inc.*, 820 F. Supp. 317, 319 (E.D. Mich. 1993); *Hunsaker* v. *Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992), aff'd, 5 F.3d 1489 (3d Cir. 1993); *Covey* v. *Surgidev Corp.*, 815 F. Supp. 1089, 1094 (N.D. Ohio 1993).

[8] See, *e.g.*, *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012, 1017 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562, 567 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993).

B. The Safety Act's Savings Clause Does Not Preserve Common Law Duties That Are Inconsistent With An FMVSS.

In finding no express preemption, the Eleventh Circuit also held (Pet. App. 7a-8a) that the Safety Act's savings clause, 15 U.S.C. § 1397(k) (compliance with a FMVSS "does not exempt any person from any liability under common law"), bars express preemption of common law liability.[9] The savings clause, however, serves a far more limited function than the one ascribed to it by the Eleventh Circuit. The court of appeals failed to address this function — or the many decisions of this Court supporting a narrow interpretation of the savings clause. See *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) ("general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision").

The savings clause in the Safety Act indicates Congress' intent not to occupy the entire field of motor vehicle safety, so that common law claims could proceed in areas *not* covered by a safety standard. Faced with similar provisions in other statutes, this Court has interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose liability for acts permitted by a federal agency, the Court explained that general savings clauses do not allow

[9] The court of appeals noted that the statute in *Cipollone*, unlike the Safety Act, lacked a savings clause. That cannot be dispositive, however, because this Court found express preemption of common law claims in *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1736-1737 (1993), and the statute at issue had a savings clause. See pages 20-21, *infra*; see also *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-2040 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

states to enforce state law claims that conflict with federal law. 450 U.S. at 328. Rather, general savings clauses are included in statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." See also *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976); see generally pages 24-25, *infra*.

So too, the savings clause in the Safety Act was added not to defeat the statutory goal of creating a set of nationally uniform motor vehicle safety standards, but rather to indicate Congress' intent not to preempt the remainder of the field of motor vehicle safety not covered by those standards.

Thus, the savings clause expressly preserves common law actions that do not relate to the "same aspect of performance" as a Federal Motor Vehicle Safety Standard. 15 U.S.C. § 1392(d). This case is an excellent example: FMVSS 121 expressly grants, for safety reasons (see pages 3-4, 7, *supra*), a choice whether to install antilock braking devices and provides specifications for those devices that are installed. The savings clause would thereby preserve a common law claim that an antilock braking system was negligently

manufactured. See *Sours* v. *General Motors Corp.*, 717 F.2d 1511, 1516-1517 (6th Cir. 1983) (tort claim allowed because no conflict between defective design claim and FMVSS 216). On the other hand, it would not preserve a common law action, such as the claims under review here, seeking to recover damages from a defendant merely for exercising a federally granted safety option. Such a lawsuit is inconsistent with FMVSS 121 because it extinguishes a choice granted, as a matter of safety, by NHTSA. See, *e.g.*, *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (distinguishing a failure-to-install-airbag claim from a claim that a particular airbag system was not properly designed, and holding that the latter claim is not preempted).

The savings clause in Section 1397(k), which is wholly separate from the Safety Act's preemption provision in Section 1392(d), gives no indication on its face that it was intended to create a giant exception to the Act's preemption section. In fact, Section 1392(d) expressly provides two exceptions to the general rule of federal preemption for any state safety standard that "is identical to a Federal safety standard" and for safety standards imposing higher standards of performance for government vehicles.[10] These two narrow provisions in Section 1392(d) show that when Congress intended to create exceptions to federal preemption,

[10] The exceptions in Section 1392(d) provide that:

> [n]othing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

it included them in the preemption section of the Act, and that Congress otherwise intended federal safety standards to preempt all state laws that conflict with those standards.

The Eleventh Circuit in this case failed to follow this statutory scheme, as well as this Court's precedents, in construing the Safety Act's savings clause to authorize state law tort claims that serve to undermine a carefully drawn system of nationally uniform federal safety standards.

II. THE SAFETY ACT IMPLIEDLY PREEMPTS COMMON LAW TORT CLAIMS THAT ARE INCONSISTENT WITH FEDERAL MOTOR VEHICLE SAFETY STANDARDS

Even if respondents' claims are not expressly preempted by the Safety Act, they are impliedly preempted because they conflict with an FMVSS. Under the Safety Act's scheme of nationally uniform motor vehicle safety standards, every court of appeals that had addressed the issue (including the Eleventh Circuit until its decision in this case) had concluded that tort claims based on a motor vehicle manufacturer's exercise of an FMVSS safety option were impliedly preempted under the Safety Act because state tort law would conflict with and frustrate the purposes of the federal regulatory scheme.[11] Relying on numerous preemption

[11] The prior cases involved common law claims based on a motor vehicle manufacturer's failure to install airbags, which were found to be impliedly preempted under the Safety Act and FMVSS 208, 49 C.F.R. § 571.208 (granting manufacturers an option to install airbags). See *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1989); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990). A number of state appellate courts reached the same result. See, *e.g.*, *Nissan Motor Corp.* v. *Superior Court*,

decisions of this Court, the Eleventh Circuit in *Taylor* v. *General Motors Corp.*, 875 F.2d 816, 827 (1989), cert. denied, 494 U.S. 1065 (1990) (applying FMVSS 208), had concluded that "a state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option."

Those decisions properly followed a line of precedents holding that any state law that removes or restricts an option granted by a federal regulation conflicts with federal law and is preempted. In *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. at 155, for example, the Court held that a federal regulation granting federal savings and loan associations the option of including "due-on-sale clauses in their contracts" preempted California common law, which provided that due-on-sale clauses were unenforceable. California common law was preempted because it purported to give "the California courts * * * [authority to] forbid[] a federal savings and loan to enforce a due-on-sale clause solely 'at its option' and * * * deprived the lender of the 'flexibility' given it by the" federal regulation. *Ibid.* See also *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 708-709 (1984) (state law cannot deprive regulated entities of "flexibility and discretion" deliberately conferred by federal law); *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 260-261, 270 (1985) (state law is preempted to the extent it eliminates "flexibility" contemplated by federal law).

The same result should have obtained in this case. The Eleventh Circuit, however, refused to follow this Court's decisions and even its own precedent (as well as the unbroken

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261 Cal. Rptr. 80 (Cal. Ct. App. 1989), cert. denied, 494 U.S. 1066 (1990); *Gardner* v. *Honda Motor Co.*, 536 N.Y.S.2d 303 (App. Div. 1988), app. dismissed, 543 N.Y.S.2d 401 (1989); *Wickstrom* v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), cert. denied, 487 U.S. 1236 (1988).

chain of rulings from other circuits) finding implied preemption under the Safety Act. Instead, the court of appeals charted a new course in federal preemption law by holding that it was powerless to engage in any implied preemption analysis. This remarkable conclusion was based upon a plain misreading of this Court's decision in *Cipollone*.

A. *Cipollone* Did Not Radically Transform Preemption Law.

The Eleventh Circuit held that it was obliged to reject petitioners' implied preemption defense in light of a single sentence in *Cipollone* stating that if a federal statute has an express preemption clause and if "that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." 112 S. Ct. at 2618 (citations omitted). The court of appeals broadly interpreted this one sentence to mean that the implied preemption doctrine is no longer applicable to statutes with express preemption clauses. Because the Safety Act has a preemption clause, 15 U.S.C. § 1392(d), the court refused to consider an implied preemption analysis (Pet. App. 11a).[12]

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[12] The Eleventh Circuit tried to minimize the significance of its holding by asserting that "eight of our sister circuits have reached the same conclusion." Pet. App. 11a. None of the cases cited by the court, however, held that an express preemption clause precludes implied preemption where — as here — there is an actual conflict between federal and state law. In most of the cases cited, the courts found express preemption, see *Worm* v. *American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Kinley Corp.* v. *Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993); *Weber* v. *Heaney*, 995 F.2d 872 (8th Cir. 1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993); *Greenwood Trust Co.* v. *Commonwealth of Massachusetts*, 971 F.2d 818 (1st Cir. 1992), cert. denied, 113 S. Ct. 974 (1993), and thus there was

1. This rationale is flatly inconsistent with this Court's precedents. As a threshold matter, it is at odds with the long-settled proposition that any state law that conflicts with federal law is preempted "by direct operation of the Supremacy Clause," without regard to whether the federal statute or regulation contains a preemption clause. *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984). Indeed, the *Cipollone* Court itself noted that since the "decision in *McCulloch* v. *Maryland*, 4 Wheat. 316, 427 (1819), it has been settled that state law that conflicts with federal law is 'without effect.'" 112 S. Ct. at 2617.

Whether a federal statute preempts state law is determined by the intent of Congress, which may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. at 1737. Even "[i]n the absence of an express congressional command," however, a "state law is pre-empted if that law actually conflicts with

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no need to decide whether implied preemption bars application of a state law that is beyond the scope of an express preemption clause but that conflicts directly with federal law. In three other cases, there was no conflict between state and federal law, *Draper* v. *Chiapuzio*, 9 F.3d 1391 (9th Cir. 1993); *Toy Mfrs. of Am., Inc.* v. *Blumenthal*, 986 F.2d 615 (2d Cir. 1993); *Cleveland* v. *Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir.), cert. denied, 114 S. Ct. 291 (1993), and in one case the Second Circuit stated that "a finding of implied preemption * * * is not *automatically* foreclosed by the existence of a preemption clause." *Toy Mfrs. of Am.*, 986 F.2d at 623 (emphasis in original).

federal law." *Cipollone*, 112 S. Ct. at 2617. As Justice Souter observed last Term, "whether or not Congress has used any special 'preemptive' language, state regulation must yield to the extent it actually conflicts with federal law." *BFP* v. *Resolution Trust Corp.*, 114 S. Ct. 1757, 1776 (1994) (Souter, J., dissenting, joined by Blackmun, Stevens, and Ginsburg, JJ.).

Thus, although a statutory preemption clause "must in the first instance" be the focus of any preemption analysis, *Easterwood*, 113 S. Ct. at 1737, such a clause does not preclude implied conflict preemption.[13] This Court has often considered (indeed, accepted) implied preemption arguments in cases involving federal statutes with express preemption clauses. See, *e.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142-143 (1990); *Northwest Cent. Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. 493, 509-522 (1989). In *Jones* v. *Rath Packing Co.*, for example, the Court concluded that, although the express preemption provision of the Fair Packaging and Labeling Act, 15 U.S.C. § 1461, did not preempt the state law at issue, the Supremacy Clause prohibited enforcement of that law because it conflicted with the federal statute and prevented "the accomplishment and execution of the full purpose and objectives of Congress." 430 U.S. at 526, 540-543 (internal quotation marks omitted). The Court held that "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict." *Id.* at 525-526.

2. The Eleventh Circuit nonetheless held, and respondents maintain, that in one sentence the *Cipollone* Court intended to repudiate this long line of precedents

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[13] No presumption against preemption is applicable in deciding whether state law conflicts with federal law. See *Felder* v. *Casey*, 487 U.S. 131, 138 (1988).

interpreting the Supremacy Clause over the last two hundred years. This reading of *Cipollone* is singularly improbable in light of both the complete absence of any suggestion that the Court was embarking on such a radical course, see, *e.g.*, *Lee* v. *Weisman*, 112 S. Ct. 2649, 2655 (1992), and the contrary decisions rendered by this Court immediately before and after *Cipollone*.

In *Gade* v. *National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2382 (1992), for example, the plurality found that a state law was impliedly preempted despite an express preemption clause in the federal statute. Justice Kennedy concluded that the state law was expressly preempted and concurred only in the judgment. *Id.* at 2388. No Member of the Court stated or even hinted that the doctrine of implied conflict preemption was inapplicable because of the presence of an express preemption clause. The court of appeals nonetheless dismissed *Gade* as a mere "plurality opinion" (Pet. App. 14a). The significance of *Gade*, however, is that the opinion was joined by three Justices (the Chief Justice and Justices O'Connor and White) who would — six days later — join the sentence in *Cipollone* that the court below interpreted to bar implied preemption in the face of an express preemption clause.

Indeed, after *Cipollone*, this Court decided *CSX Transp., Inc.* v. *Easterwood*, which considered whether state tort claims regarding a warning device at a railroad crossing were preempted by the Federal Railroad Safety Act (FRSA). The FRSA has an express preemption clause that bars any state law requirement that relates to railroad safety when there is a federal "rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. Because the Court concluded that the federal regulations at issue did not "cover" the same subject matter as the tort claims, it held that those claims were not expressly preempted. 113 S. Ct. at 1742. The Court proceeded to "reject" the

"claim of implied 'conflict' preemption on the basis of the preceding analysis" (*id.* at 1742 n.12 (citation omitted)).

The Eleventh Circuit interpreted *Easterwood* as precluding a "separate implied pre-emption analysis" if there is an express preemption clause in a statute (Pet. App. 17a). However, as Judge Hill noted in his dissent below, the more logical reading is that the Court "did not conduct an implied conflict pre-emption analysis because, 'on the basis of the preceding analysis,' it found no conflict between the federal regulations and the common law negligence claim" (*id.* at 30a). Thus, the Court considered and "reject[ed]" implied preemption *on the merits*, not because it was inappropriate to consider the contention.

In fact, the *Easterwood* Court stated that an express preemption clause is *not* dispositive. Preemption analysis "must *in the first instance* focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." 113 S. Ct. at 1737 (emphasis added). In this case, by contrast, the court of appeals held that an express preemption clause is not the first but the *only* evidence ("the alpha and omega" (Pet. App. 18a)) of Congress' preemptive intent. That holding is wrong both as a general proposition and as applied to the Safety Act.[14]

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[14] A number of courts have considered the issue of implied preemption under the Safety Act since *Cipollone* was decided and have, unlike the Eleventh Circuit, found common law tort claims impliedly preempted. See, *e.g.*, *Boyle* v. *Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993); *Marrs* v. *Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Gills* v. *Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993). Moreover, the D.C. Circuit recently stated in *Jackson* v. *Culinary School of Washington, Ltd.*, 27 F.3d 573, 581 n.12 (1994), that it does

> not read *Cipollone* to stand for the proposition that the enumeration of preempted areas in a statute forecloses

B. The Preemption Clause In The Safety Act Does Not Provide A Reliable Indicium Of Congressional Intent.

A careful reading of *Cipollone* and *Easterwood* reveals that implied conflict preemption has *not* been abolished in *all* cases involving federal statutes with express preemption clauses. Instead, *Cipollone* stands only for the unremarkable proposition that, because congressional intent is the "'ultimate touchstone'" of preemption analysis, *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978) (citation omitted), implied preemption arguments might be barred where a statute's express preemption clause "provides a 'reliable indicium of congressional intent with respect to state authority.'" 112 S. Ct. at 2617, 2618 (quoting *Malone*, 435 U.S. at 505). The sentence in *Cipollone* seized on by the Eleventh Circuit as radically reworking federal preemption law is, in fact, nothing more than a recapitulation of this Court's prior decisions on preemption and the Supremacy Clause, relying as it does on *Malone* and a plurality opinion by Justice Marshall in *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 282 (1987), neither of which provides any support for the Eleventh Circuit's remarkable holding.

Instead of following this Court's settled precedents, the Eleventh Circuit cavalierly brushed aside the "reliable indicium" requirement of *Cipollone* and *Malone*, finding it "not much of a hurdle" (Pet. App. 18a). Although the court recognized that this requirement was a "condition" of this Court's analysis in *Cipollone* (*ibid.*), it converted this

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altogether the possibility that state statutes in actual conflict can be preempted. * * * Where a state statute actually frustrates the purposes of Congress, we do not believe that the specific preemption clauses in a statute alone provide a "reliable indicium of congressional intent with respect to state authority." *Cipollone*, 112 S. Ct. at 2618.

condition into a "presumption" (*id.* at 19a) — with no precedent or rationale to support it — that a preemption clause, in and of itself, is always a reliable indicium of congressional intent to eliminate implied preemption. This presumption, in the court of appeals' view, is virtually conclusive: a preemption clause is "the alpha and omega" of the inquiry on congressional intent (*id.* at 18a).[15]

If it had examined the issue of congressional intent as required by *Cipollone* and *Malone*, however, the court of appeals would have found — for at least three reasons that it rejected without serious analysis — that the Safety Act's preemption clause does not provide a reliable indication of congressional intent to preclude implied preemption of state laws that conflict with the federal scheme embodied in the Act.

1. Most important, the Safety Act's preemption provision, 15 U.S.C. § 1392(d), does not purport to be an exhaustive description of the state authority that Congress meant to displace. Nothing on the face of Section 1392(d) suggests that it was intended to wipe out implied preemption and to authorize states to engage in lawmaking that would conflict with or frustrate the purposes of the federal scheme.

Moreover, it is significant that this case involves preemption by federal regulation. Where the source of preemptive federal action is an administrative agency rather than Congress itself, it is unreasonable to expect a statutory preemption provision to define the full scope of preemption required to ensure the supremacy of federal law. This is

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[15] If anything, the presumption should operate in the opposite direction. Absent compelling evidence to the contrary, it should be presumed that Congress did *not* intend to eliminate the implied preemption doctrine. After all, why would Congress want to authorize state action that conflicts with or frustrates the purposes of federal law?

especially true here because the safety regulations were issued under a broad delegation of congressional power. See 15 U.S.C. §§ 1381, 1392(a), 1407.

2. The Safety Act's preemption section also does not provide a "reliable indicium" of Congress' intent to displace implied conflict preemption because it does not reflect all of the available evidence of Congress' thinking. The savings clause included in Section 1397(k) — which provides that compliance with a safety standard "does not exempt any person from liability under common law" — shows that Congress expected implied preemption to operate under the Safety Act. The savings clause was added to prevent implied *field* preemption from entirely displacing state law (see pages 12-14, *supra*), but Congress did not save state law claims from implied *conflict* preemption. Indeed, there would have been no need to adopt a savings clause at all if the mere existence of an express preemption clause foreclosed any implied preemption inquiry.

This Court has often warned that general savings clauses should not be construed in an indiscriminate fashion to allow common law actions that would subvert a federal regulatory scheme. In *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. at 446, the Court held that a general savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

More recently, in *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-494 (1987), the Court held that a general savings clause could not be invoked to save from preemption common law remedies that conflicted with a federal administrative scheme, noting that "we do not believe Congress intended to undermine this carefully drawn statute

through a general savings clause." See also *Morales*, 112 S. Ct. at 2037; *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986) (Court refuses to allow savings clause to impose "widely divergent state law" on federal "uniformity").

The lower court cases cited by respondents for the proposition that the Safety Act "does not preempt common law claims" (Br. in Opp. 11-12) support an interpretation of the savings clause as precluding only field (and not conflict) preemption. None of the cases cited presented a square conflict between a Federal Motor Vehicle Safety Standard and a state common law rule. In the absence of such a conflict, the savings clause authorizes a tort action to proceed because the Safety Act does not preempt the entire field of motor vehicle safety.[16] For example, several cases cited by respondents involved a claim that a motor vehicle's roof was improperly designed. Although FMVSS 216 prescribes "a minimum level of roof strength" (*Sours* v. *General Motors Corp.*, 717 F.2d at 1516-1517), it does not prescribe any design features (*id.* at 1516), and thus there is no conflict

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[16] In many of the cited cases, the courts merely recited or referred in passing to the language of the savings clause without considering the issue of implied conflict preemption — or even preemption generally. See, *e.g.*, *Chrysler Corp.* v. *DOT*, 472 F.2d 659 (6th Cir. 1972); *Larsen* v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). In other cases, there was no hint that any FMVSS even remotely related to the tort claim asserted, let alone conflicted with that claim. See, *e.g.*, *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981); *Knippen* v. *Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976). In *Schwartz* v. *American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983), the court stated that "there were no federal standards governing the relevant portions of the" vehicle. See also *Dorsey* v. *Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981) (FMVSSs "are unrelated to several of the design deficiencies developed by the plaintiffs' evidence"), cert. denied, 459 U.S. 880 (1982).

between the federal standard and a defective design claim for a particular vehicle's roof.[17] As the Sixth Circuit noted in *Sours*, "utilization of officially approved design features * * * is far different from compliance with the threshold FMVSS 216 standard, which by its terms sets only a minimum level of roof strength." *Id.* at 1517. A common law tort action challenging roof design therefore is not impliedly preempted by FMVSS 216. *Ibid.*

3. Finally, a recent amendment to the Safety Act, not discussed by the court of appeals (although brought to its attention in the briefs of *amici*), provides further evidence that the court's conclusion on congressional intent is wrong. In reauthorizing the Safety Act in 1991, Congress explicitly ratified implied preemption in directing NHTSA to amend FMVSS 208 to require airbags in all new motor vehicles. Congress recognized that several courts had held that tort suits based on the failure to install airbags were impliedly preempted and that the "all airbag" amendment might be construed as disturbing those precedents. See Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086 (1991); H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1783. The 1991 amendment therefore specified that it

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Section 2508(d), 105 Stat. 2086. The conference report, citing the prior decisions finding for the manufacturers on the grounds of implied preemption, explained that Congress

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[17] See *Stonehocker* v. *General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978); *Shipp* v. *General Motors Corp.*, 750 F.2d 418 (5th Cir. 1985).

"do[es] not want by this section to change the law on liability as it existed prior to enactment" (*i.e.*, late November 1991). H.R. Conf. Rep. No. 404 at 403, *reprinted in* 1991 U.S.C.C.A.N. at 1783. This legislation and its history show conclusively that Congress was aware of, and content with, the cases construing the Safety Act to allow implied preemption analysis. Contrary to the Eleventh Circuit's holding, the Safety Act's express preemption provision — in the face of this congressional ratification of the existence of the implied preemption doctrine under the Act — cannot possibly be a "reliable indicium" of Congress' intent to preclude an implied preemption inquiry.

In sum, the Eleventh Circuit's refusal to consider petitioners' implied preemption defense was plainly erroneous. This Court in *Cipollone* clearly did not intend to abolish that defense in the context of every statute containing an express preemption provision. And more specifically, the language and legislative history of the Safety Act offer compelling proof that Congress intended that implied preemption would remain available to ensure the national uniformity of safety standards and to prevent frustration of the federal scheme.

III. REVERSAL IS NECESSARY TO VINDICATE THE SUPREMACY OF FEDERAL LAW

If the interpretation of *Cipollone* urged by respondents is adopted, it will mean that state common law can impose duties that plainly frustrate federal objectives or even make it *impossible* to comply with federal law duties under the Safety Act and many other federal statutes, see pages 9-11, *supra*. This result is plainly unacceptable and contrary to the Supremacy Clause and almost two centuries of established preemption doctrine.

Yet, under respondents' rationale, this result is *required* whenever (1) the federal statute upon which the claim of preemption is based has an express preemption clause, and

(2) that clause, narrowly construed, does not encompass the state law obligation forming the basis for the plaintiff's claim. In that event, an implied preemption defense would be unavailable, even if "compliance with both federal and state regulations is a physical impossibility" or if "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 605 (1991) (citations and internal quotation marks omitted).

Moreover, this erroneous reading of *Cipollone* leads to the anomalous result that a federal statute would have greater preemptive force *without* a preemption clause than with one. For example, if the Safety Act had no express preemption clause, the Eleventh Circuit in this case would have applied its precedents and found implied conflict preemption. The *inclusion* of an express preemption clause in the statute, however, caused the court to reject implied federal preemption analysis entirely. Needless to say, courts should seek to avoid attributing such an absurd design to Congress. See *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988).

These unacceptable results flow directly from a plain misreading of *Cipollone* (on implied preemption) and refusal to follow *Cipollone* (on express preemption). By holding that state common law claims do not fall within a federal express preemption provision unless the provision refers specifically to the common law *and* that the mere presence of an express preemption provision bars any implied preemption inquiry, the court of appeals sanctioned a regime in which the states may wholly frustrate the purposes of a federal statutory scheme so long as they act through their common law.

Under this regime of divergent standards, members of ATA cannot know whether the trucks they put on the road meet all applicable legal requirements. Although the federal government decided — for safety reasons — to make antilock brakes optional on trucks and trailers, a jury in Georgia or

Maine or California might decide that antilock brakes are required to meet a common law duty of care. On the other hand, juries in Alabama or New Hampshire or Oregon might decide that antilock brakes are dangerous and breach common law standards in those jurisdictions. As President Johnson observed almost thirty years ago, "50 standards for 50 different states * * * would be chaotic." 112 Cong. Rec. 14,253 (1966). The adverse effects on safety and interstate commerce of nonuniform standards are clear.

Furthermore, the importance of this issue extends beyond national motor vehicle safety to drugs, medical devices, pesticides, and numerous other areas of federal health and safety regulation where federal uniformity is critical. For many of these regulatory schemes, in which members of NAM are vitally interested, the lower courts have already found federal preemption of inconsistent common law claims. See pages 9-11, *supra*. A contrary ruling in this case would undermine those regulatory programs in addition to the program of motor vehicle safety established by the Safety Act.

This Court should reverse the Eleventh Circuit's unprecedented misinterpretation of *Cipollone*, which would bring about "a radical reworking of our law" (*Osborne* v. *Ohio*, 495 U.S. 103, 119 (1990)), and reaffirm the supremacy of federal law over conflicting state law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DANIEL R. BARNEY
LYNDA S. MOUNTS
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314
(703) 838-1865

JAN S. AMUNDSON
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 637-3055

KENNETH S. GELLER*
ERIKA Z. JONES
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 463-2000

* *Counsel of Record for the Amici Curiae*

NOVEMBER 1994